Supreme Court, U.S.
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No. 98-1135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AQUATHERM INDUSTRIES, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Court should grant a Writ of Certiorari where Petitioner bases its arguments for review on dicta from the appeals court decision.

II. Whether the Court should grant a Writ of Certiorari where Petitioner incorrectly categorizes the case as a regulatory circumvention case.

III. Whether the Court should grant a Writ of Certiorari where the appeals court affirmed dismissal because Aquatherm could prove no facts to support its claim.

STATEMENT PURSUANT TO RULE 29.6

FPL Group, Inc. is the parent company of Florida Power & Light Company. There are no nonwholly owned subsidiaries of Florida Power & Light Company.

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STATEMENT OF THE CASE

A. Procedural History

On December 5, 1991, Aquatherm Industries, Inc. ("Aquatherm"), a manufacturer of solar pool heaters, filed a complaint in the Circuit Court for Palm Beach County, Florida, against Florida Power & Light Company ("FPL"), alleging that FPL engaged in false and deceptive advertising, violated Florida's antitrust laws, and violated the Florida Energy Efficiency and Conservation Act. Two months later, the state court dismissed all four counts, with leave to amend the antitrust claims. Plaintiff amended, alleging the following state antitrust violations: (1) Lanham Act false and deceptive advertising (federal) (2) monopoly leveraging (state); (3) attempted monopolization (state); and (4) conspiracy to monopolize (state).

FPL removed the case to the United States District Court for the Southern District of Florida. In turn, Aquatherm withdrew the federal claims, so the cause was remanded to state court, where on November 20, 1992, after argument, the third amended complaint was dismissed with prejudice. The dismissal was subsequently affirmed without opinion. *Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 635 So. 2d 26 (Fla. Dist. Ct. App. 1994).

While the state action was pending, Aquatherm filed this action in the United States District Court for the Middle District of Florida, alleging violations of federal antitrust statutes virtually identical to the earlier alleged state antitrust claims plus Lanham Act claims. Soon thereafter, Aquatherm amended its federal complaint, adding Counts VI through IX alleging the same antitrust violations as in Counts I through

IV, but seeking treble damages for them under the Clayton Act, 15 U.S.C. § 15. The district court granted FPL's motion to dismiss upon a determination that the state court dismissal of the trade libel and disparagement claim and state antitrust claims was *res judicata* on the federal Lanham Act and federal antitrust claims. On appeal, the Eleventh Circuit affirmed in part and reversed in part, holding that *res judicata* barred the Lanham Act claims, but not the later-filed federal antitrust claims. *Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 84 F.3d 1388 (11th Cir. 1996).

After remand, FPL filed a renewed Rule 12(b)(6) motion to dismiss on the merits the remaining Sherman Act Sections 1 and 2 claims: (1) monopoly leveraging; (2) attempted monopolization; (3) conspiracy to monopolize; and (4) restraint of trade. On July 9, 1997, the district court entered an Order granting FPL's renewed motion to dismiss the Amended Complaint and directing the clerk to close the file.

Aquatherm appealed the district court's dismissal, making arguments essentially identical to those in this petition for a writ of certiorari. The Eleventh Circuit affirmed the district court's dismissal. *Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 145 F.3d 1258 (11th Cir. 1998).

B. Statement of the Facts

Aquatherm's brief misrepresents FPL's obligations under the Florida Energy and Efficiency Act ("FEECA"), Fla. Stat. § 366.80 *et seq*. *See* Pet. 5. FPL was never mandated to advise its customers to replace with solar pool heaters any pool heating systems that rely on non-renewable energy sources. FEECA requires FPL to provide energy audits for its customers at their request. The Florida Public Service

Commission ("FPSC") rules implementing FEECA require the auditor to provide the customer with an estimate of the energy and overall cost savings, installation cost, annual maintenance costs, first year's energy savings, and payback period of certain "conservation measures." Fla. Admin. Code r. 25-17.057(2). The list of 20 conservation measures includes installation of "heat pump or natural gas water heaters" and the use of "solar domestic water heating" and "solar swimming pool heating (where pools are presently heated with a non-renewable resource)." Fla. Admin. Code r. 25-17.051(10). If requested by a customer, FPL will explain the different types of pool heating systems (solar, natural gas, heat pump, and electric resistance) and provide a list of suppliers. There has never been, however, a requirement to encourage solar pool heating.

Petitioner's brief also misrepresents FPL's "Heat Pump Program." *See* Pet. 5-8. FPL's failure to refer to solar heaters in promotional materials does not constitute an implied representation that solar heaters do not exist. FPL's employees did not refuse to inform customers about solar heaters. And, FPL did not lie about the merits of PHPs.

FPL is a regulated utility in the markets for the generation, transmission and distribution of electric energy in Florida. It does not manufacture, sell, or install pool heating pumps ("PHPs") and has no economic or other ownership interest in any entity that manufactures, sells or installs PHPs or any other pool heating equipment. FPL's interest in PHPs is two-fold: (1) FPL has traditionally given customers information on technologies like PHPs that are effective and efficient; and (2) PHPs operate at a constant, high load factor, which indirectly benefits FPL by improving the efficiency of utilization of its system. FPL receives no income from the

sale of PHPs. PHP manufacturers and contractors receive no income from the sale of electricity.

In 1987, FPL began a program promoting the use of PHPs as an economical way to heat commercial swimming pools. In 1988, FPL expanded the program to residential swimming pools. Part of FPL's PHP program was an advertising campaign, including a direct mailing to FPL's residential customers with swimming pools. FPL's promotional materials for the PHP program directly compared PHPs to natural gas, propane and other fossil-fuel alternatives. *See* Pet. App. 70-73. No comparison was made to solar pool heaters.

Under this promotional program, FPL offered residential customers the following benefits: (1) a free in-home consultation by an FPL representative "in order to determine approximately how much it will cost to heat your pool using a heat pump"; (2) a $50 reimbursement incentive for FPL customers who completed a questionnaire after installation of a PHP; and (3) a list of FPL participating contractors who sell/install PHPs. FPL gave similar benefits to commercial customers: (1) FPL representatives to answer technical questions and calculate the savings one could expect from a PHP; (2) a list of participating contractors; and (3) favorable financing for PHPs through C&S Bank.

The "participating contractors" were contractors who manufactured, installed and/or serviced residential and commercial swimming pool equipment. These contractors dealt directly with the ultimate purchasers of PHPs and were not required to deal exclusively in PHPs. They were free to sell other pool heating systems such as solar, oil, or natural gas heating systems. Many did, in fact, offer other types of

pool heating equipment. The listed contractors were given permission, subject to certain restrictions, to use FPL's corporate logo to show their participation in the PHP program. As the Eleventh Circuit correctly noted, "there is no allegation or evidence that FPL refused to allow participating contractors to buy or sell solar pool heaters." 145 F.3d at 1263.

FPL's analysis of the costs and benefits of the program did not demonstrate cost-effectiveness. Consequently, FPL terminated this incentive program in 1990, less than three years after it began and about one year before Aquatherm filed its original suit in state court in December 1991.

REASONS FOR DENYING THE WRIT

The Eleventh Circuit's ruling does not warrant review. Its holding that Petitioner failed to state a claim under Sections 1 or 2 of the Sherman Act is correct and creates no conflict with decisions of this Court or other courts of appeals. Moreover, this case turns on its particular facts and does not state any new or controversial general rules of law.

The Eleventh Circuit affirmed dismissal of Aquatherm's Sherman Act Section 2 conspiracy to monopolize claim because it was clear beyond doubt that Aquatherm could prove no set of facts in support of its claim, including specific intent to monopolize. Pet. App. 4-5, 11. The appeals court affirmed dismissal of the monopolization and attempted monopolization claims because Aquatherm failed to allege and could prove no set of facts showing that FPL was engaged in a regulatory circumvention scheme. Pet. App. 3-4, 6-7, 11. Finally, the Eleventh Circuit affirmed dismissal of the Section 1 conspiracy in restraint of trade count because there simply was no allegation nor set of facts which Aquatherm

could prove to show injury to competition as a whole rather than injury to Petitioner itself as an individual competitor. Pet. App. 6, 11.

Despite Aquatherm's protests, the Eleventh Circuit's opinion does not preclude the possibility of a conspiracy to monopolize a market in which a defendant does not participate; it merely states this particular Petitioner's inability to plead such a claim under these facts. The Eleventh Circuit's opinion does not reject the possibility that a regulated monopolist might violate Section 2 of the Sherman Act through a regulatory circumvention scheme. Finally, the opinion does not hold that the failure to name co-conspirators is, standing alone, a sufficient basis for dismissing a claim for conspiracy to monopolize. Thus, the "questions" raised by Petitioner do not challenge the opinion rendered by the Eleventh Circuit, and, accordingly, this Court should deny the instant petition.

I.

DICTA IN FOOTNOTE FOUR DOES NOT WARRANT REVIEW.

A. Footnote Four is Dicta.

Petitioner would have this Court grant certiorari in order to gratuitously clarify a correct, if incomplete, footnote to the Eleventh Circuit's opinion that amounts to no more than dicta. Pet. 16. The footnote is an additional but unnecessary basis for upholding the district court's dismissal of Aquatherm's Section 2 conspiracy claim. In the body of the opinion, the court spells out the factors that form the basis for its ruling: Aquatherm's inability to allege, under these circumstances, any facts showing "concerted action

deliberately entered into with the specific intent of achieving a monopoly." Pet. App. 6.

The dicta in the footnote upon which Aquatherm's argument relies states in full:

> Equally fatal to Aquatherm's conspiracy allegation is the fact that no authority exists holding a defendant can conspire to monopolize a market in which it does not compete. The cases relied upon by Aquatherm offer no support under § 2. *See, e.g., Nash v. United States*, 229 U.S. 373 (1913) (Section 1 conspiracy claim alleged in restraint of trade is not the equivalent of a § 2 monopolization claim). The plaintiff can cite to no case in which at least one of the defendants charged with conspiracy to monopolize was not a competitor in the relevant market.

Pet. App. 6, n.4.

The appellate court below did not base its affirmation of the district court's dismissal on the reasoning in this footnote. When the court said "*equally* fatal" (emphasis added), it made quite clear that factors discussed in the body of the court's opinion not addressed in the footnote were fatal to Aquatherm's conspiracy allegation.

B. Footnote Four is a Correct Statement of Law Under the Specific Circumstances of this Case.

Aquatherm not only relies on dicta for the basis of its Petition, but also misrepresents the meaning of the dicta in an effort to argue that it somehow creates a conflict with other

circuits requiring the attention of this Court. *Out of context*, the Eleventh Circuit's footnote perhaps raises an academic question: Can a party be liable under Section 2 of the Sherman Act for conspiring to monopolize *for itself* or *for others* a market in which it does not compete? In context, it is clear that the Eleventh Circuit was referring only to the inability of FPL to monopolize for itself a market in which it does not compete. The *dicta* in the footnote clearly does not preclude the possibility of a conspiracy to monopolize for others a market for others in which a defendant does not participate.

This dicta was stated in the context of three Sherman Act Section 2 counts alleged in the complaint: Section 2 monopoly leveraging, Section 2 attempted monopolization, and Section 2 conspiracy to monopolize. In dismissing the monopoly leveraging and attempted monopolization claims, the court reasoned that FPL could not be liable for the monopolization or attempted monopolization of a market in which it does not compete, never has competed and has no plans to enter. Pet. App. 4. Petitioner does not challenge the court's reasoning as applied to the monopolization and attempted monopolization claims. For those two claims, there can be no doubt that Petitioner was accusing FPL of using its monopoly to leverage *itself* into a market and attempt to monopolize a market *for itself.*

But Aquatherm was very vague about what market or markets were relevant. In trying to construe the complaint liberally the Eleventh Circuit struggled to imagine what markets Aquatherm might be referring to and identified two, the electric power and pool heater equipment markets. Pet. App. 4. It then carefully went through each Section 2 claim. Monopolization of the electric generation and transmission market? Not possible because FPL cannot increase or lose

its monopoly share of that statutorily protected market. Pet. App. 3-4. The overall market for all sources of energy used in heating pools? FPL has no monopoly there to maintain or enhance, and Aquatherm did not allege that FPL has enough power in that overall market to present a dangerous probability of success in an attempt to monopolize it.[1] Attempted monopolization of the market for pool heating equipment? Not possible because FPL was not a market participant. Pet. App. 3-4. Monopoly leveraging by extracting monopoly rents out of the pool heating equipment market? Again, not possible because FPL is not a market participant. Pet. App. 6-7.

The Eleventh Circuit's footnote, which Aquatherm now challenges, is nothing more than the court's attempt to patch together a possible fact pattern that theoretically Aquatherm might have wanted to allege, but did not. In this footnote the appeals court attempted to conjure a best case scenario for Aquatherm. It was truly a "best" case scenario because Aquatherm had alleged at least some facts regarding FPL's market power and alleged illegal conduct, but had alleged nothing whatsoever about the structure of the PHP market, the power of its participants, jointly or severally, or any agreement among its members. The court of appeals, therefore, focused on one possible fact pattern. It asked if FPL could be liable for conspiring with others to monopolize the PHP manufacturing and installation markets for itself, the only defendant and the only "conspirator" about whom the court was told anything in the pleadings. The answer was, of course, no. Just as a party cannot monopolize or attempt

1. Aquatherm now complains that the Eleventh Circuit "cast aside" that possible theory. Pet. 24. In fact, the Eleventh Circuit graciously gave it more attention than Aquatherm had ever given it, in its complaint or its briefs.

to monopolize a market for itself if it is not a competitor in or potential entrant into that market, a party cannot conspire to monopolize that same market for itself. A party cannot have the specific intent to monopolize for itself if it has no intent to sell products or services in the market. The court's conclusion follows logically from the requirement of specific intent to monopolize.

Aquatherm never raised in its complaints nor in its briefs to the Eleventh Circuit the other conceivable fact pattern — where FPL allegedly conspired with the PHP manufacturers and installers to monopolize the market for them. It did not name or sue PHP manufacturers or installers. Thus, it is not surprising that the Eleventh Circuit would speak only to the first fact pattern, which is the scenario that Aquatherm appeared to focus on throughout its complaint and its appeal to that court. So it is in that context that the appeals court made the statement contained in footnote four.

The Petitioner would now like this Court to take up what is a purely academic question in this case: Can one party be liable under Section 2 for conspiring to monopolize for others a market in which it does not itself compete or sell products? But the Eleventh Circuit did not even address this admittedly controversial issue. It is therefore hardly ripe for this Court's consideration.

C. Case Law Cited by Aquatherm is Inapposite.

Aquatherm cites numerous cases purportedly to demonstrate that footnote four is an incorrect general statement of law. These cases are legally and factually distinguishable. In fact, all but one of the Supreme Court cases to which Petitioner cites is a Sherman Act Section 1

case. *See Nash v. United States*, 229 U.S. 373 (1913) (Section 1 case); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (Section 1 case arising from a vertical maximum price fixing agreement); *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978) (Section 1 case arising from horizontal agreements among competitors to boycott certain customers). *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968) (Section 1 and Clayton Act, Section 3 (exclusive dealing) case arising from vertical agreements in which franchisees agree to install only the manufacturer/ franchisor's mufflers). Only *Klor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) has a Section 2 claim in addition to its Section 1 claim. And, in *Klor's* all parties who were alleged to have engaged in monopolizing the appliance market, participated in the affected appliance market, some as appliance manufacturers and others as appliance retailers.

Aquatherm also cites to appeals court and district court opinions as support for the proposition that a party can be liable under Section 2 for conspiring to monopolize a market in which it does not compete. Again, the cases cited provide no support for Aquatherm's argument and do not conflict with the Eleventh Circuit's opinion.[2] Rather, these cases consist

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2. *See, e.g., Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369 (10th Cir. 1979) (Burger King allegedly conspired with a paper products distributor to replace Perington as paper cup supplier with a Burger King supplier; Burger King derived direct financial benefit from its subsidiary's paper cup sales); *Parmelee Transportation v. Keeshin*, 292 F.2d 794 (7th Cir. 1961) (ICC Commission, upon receiving bribe from Keeshin, persuaded six railroads to use Keeshin's company to transport passengers from one railroad station to another. District court dismissed saying "this case does not belong in the family of anti-trust cases under any conditions."); *United States v. General Motors Corp.*, 121 F.2d 376 (Cont'd)

of vertical restraints and tying cases. In both categories, the manufacturer, wholesaler or franchisor uses its power in the primary market to coerce agreements or conspire to lessen competition in a secondary market. In vertical restraints cases, the manufacturer, wholesaler or franchisor sells or leases its products through a down-line distributor or retailer, deriving direct benefit from the sale of its product at the distribution or retail level. In tying cases, the manufacturer, wholesaler or franchisor itself sells or leases both the tying and tied products, deriving direct benefit from the sale of both products. In both scenarios, the defendant derives direct financial benefit from sales in the second market.

The distinction between a Section 1 and a Section 2 case is significant. Section 1 is clearly directed at agreements in restraint of trade, whereas Section 2 is directed at conspiracies to monopolize markets for the conspirators themselves. *See* 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 651e, at 81-82 (1996). Scholars have questioned whether

(Cont'd)
(7th Cir. 1941) (Section 1 conspiracy in which GM allegedly conspired with its dealers to force other dealers to use GMAC for financing); *DuPont Glore Forgan, Inc. v. AT&T*, 437 F. Supp. 1104 (S.D.N.Y. 1977) (Vertical and intra-enterprise agreements allegedly in violation of Section 1 only. AT&T agreed with its affiliates to fix rates); *Van Dyke Ford, Inc. v. Ford Motor Co.*, 399 F. Supp. 277 (E.D. Wis. 1975) (Bank allegedly conspired with auto dealership against plaintiff and dealer. Case involves both Section 1 and Section 2 violations. Court's statement that there is no requirement that all conspirators must be competitors is directed at allegations of Section 1 conspiracy to destroy a competitor); *Cape Cod Food Products, Inc. v. National Cranberry Ass'n*, 119 F. Supp. 900 (D. Mass. 1954) (This is a jury instruction, not a case opinion. It does stand for Petitioner's proposition. But, a jury instruction from a 1954 district court does not contradict the Eleventh Circuit's statement that "no authority exists.").

there is such a thing as a conspiracy to monopolize under Section 2 based on an agreement among parties at different levels in a market or, as here, in different markets altogether. *See* 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 809, at 372-73 (1996). Aquatherm's Petition confuses these distinctions by relying on a series of inapplicable Section 1 cases. But the Eleventh Circuit does not wade into this debate as Aquatherm obviously invites this Court to do. Rather, the Eleventh Circuit simply points out, in a footnote amounting to dicta, that Aquatherm had cited no case showing a Section 2 violation such as Aquatherm had alleged. This was fair judicial comment on the blatant inadequacy of the totality of Aquatherm's meager argument.

II.

THIS CASE IS NOT A REGULATORY CIRCUMVENTION CASE.

Aquatherm's premise is that this case involves a classic regulatory circumvention scheme in which a regulated utility has much to gain from promoting sales of related equipment because the revenue from the related equipment in an unregulated market will escape the Public Service Commission's scrutiny.[3] As both the district court and the Eleventh Circuit found, Aquatherm's premise is

3. Regulatory circumvention schemes are perhaps the one situation in which current antitrust scholars and jurists acknowledge that it makes economic sense for a monopolist to attempt to extend its monopoly into an input or related equipment market, through monopoly leveraging, attempted monopolization or a conspiracy to monopolize. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY, §§ 7.9 & 9.3 (1994); *Olympia Equipment Leasing Co. v. Western Union*

(Cont'd)

fundamentally flawed. *FPL's increased revenues will come, if at all, from an increased sale of electricity and will not escape the regulatory agency's scrutiny.* There were and could be *no* allegations that FPL will sell or install PHPs and will, thus, have cleverly "hidden" revenues from the sale of this equipment. There were no "other markets" FPL was reaching. It started out selling electric power — and that was the only market from which it sought to increase revenues. The Eleventh Circuit understood this basic flaw in Aquatherm's theory, and affirmed dismissal because of this factual problem without in any way narrowing the Sherman Act's proscription of monopolists' regulatory circumvention schemes.

III.

THE ELEVENTH CIRCUIT PROPERLY AFFIRMED DISMISSAL OF THE SECTIONS 1 AND 2 CONSPIRACY COUNTS WITH PREJUDICE BECAUSE IT WAS CLEAR BEYOND DOUBT THAT AQUATHERM COULD PROVE NO SET OF FACTS IN SUPPORT OF ITS CLAIM.

Aquatherm in its Petition makes a last gasp, after years of litigation in two court systems, requesting yet another opportunity to amend its pleadings. That request must be denied. As stated by the district court, litigation today is "too

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(Cont'd)

Telegraph Co., 797 F.2d 370, 374 (7th Cir. 1986) (J. Posner). This Court recently addressed a similar situation in *NYNEX Corp. v. Discon, Inc.*, __ U.S. __, 119 S. Ct. 493 (1998). In *NYNEX* a regulated monopolist tried to enhance its profits allegedly by conspiring to monopolize the sales of unregulated waste recycling services, from which it received "rebates." Unlike *NYNEX*, in the instant case no additional revenue escaped regulatory scrutiny.

expensive a process to waste time on fanciful claims." Pet. App. 17 (quoting *Commonwealth of Pennsylvania v. Pepsico*, 836 F.2d 173, 182 (3d Cir. 1988)). Both the district court and the Eleventh Circuit viewed Aquatherm's claims and reached the same conclusion: Aquatherm can prove no set of facts in support of its claims that would entitle it to relief under the federal antitrust statutes. Pet. App. 11, 16-18. *See also Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). (The fact that Florida's state courts reached the identical conclusion regarding the state antitrust claims underscores how thoroughly Petitioner has already had its opportunity to be heard — and heard — and heard.)

A. The Appeals Court Properly Affirmed Dismissal of the Section 2 Claim.

The Eleventh Circuit affirmed dismissal of the Section 2 conspiracy to monopolize claim for failure to allege any specifics in support of the conspiracy, including specific intent and at least some specifics on who the co-conspirators were. Pet. App. 5-6. The Eleventh Circuit's holding is consistent with the law of this Court and is not in conflict with any circuit.

Aquatherm now incorrectly asserts that the Eleventh Circuit upheld the district court's dismissal of the conspiracy to monopolize solely because Aquatherm failed to name the co-conspirators. The appeals court did no such thing. It upheld the dismissal because Aquatherm

> specifies no fact in support of this [conspiracy] allegation. . . . and there is no showing of the requisite specific intent — on the part of FPL or any other party — to achieve a monopoly.

Pet. App. 5. The Eleventh Circuit is, indeed, appropriately critical of the Petitioner's vague reference to the members of the conspiracy, but does not rest its opinion on that single flaw in the complaint. Instead, the Eleventh Circuit indicates that a mere unspecified reference to a category of alleged conspirators and a conclusory allegation that they had the intent to monopolize is insufficient, without more, to state a claim.

Notably, Aquatherm falls far short of identifying even a group that may be involved the alleged conspiracy. The alleged "group" of conspirators, by Aquatherm's theory, appears to be an ever growing and shrinking group of pool heating installers who at any given moment might be installing electric heating equipment. Or, is the alleged "group" larger? Might not it also include every installer who ever tried to persuade a homeowner to install an electric pool heating system and every manufacturer of PHPs? FPL is left to speculate about just how grand and fluid a group is involved in this purported conspiracy. No defendant could rationally know "whom" they were alleged to have conspired with from Petitioner's pleadings.

Further, the Eleventh Circuit found that no such conspiracy could be pled under these specific facts. It should be remembered that the purpose of the conspiracy alleged here purportedly was to monopolize the pool heating equipment manufacture and installation market(s). Some specific facts must, therefore, be supportable to suggest that agreements with this specific purpose existed. But the only agreements ever put forth were those that arose when pool heating installation contractors accepted FPL's rebate offer. The acceptance amounted to an agreement. Each time, however, an installer did a job and was rebated, it was a single

transaction between FPL and the installation contractor, with no strings attached. Accepting FPL's rebate incentive on one pool installation put the contractor under no obligations with respect to subsequent installations.

Aquatherm never alleged, nor could it, that the installers agreed among themselves to install only electric pool heating equipment. Aquatherm has not alleged that an understanding of any sort existed among any installers or that FPL was accumulating a series of individual agreements with itself at the center of the spokes coordinating a tacit conspiracy. Indeed, Aquatherm has never suggested that the rebate program in any way tied up installers or would have the cumulative effect of leaving no one around to install solar or gas heating systems.

An intent to monopolize means an intent to drive so many competitors out of the market that the conspirators can raise prices to monopoly levels. With literally no specifics indicating something more nefarious than rebates from FPL to installation contractors, Aquatherm's complaint fails to show a specific intent to monopolize.

B. The Appeals Court Properly Affirmed Dismissal of the Section 1 Claim.

When ruling on the Section 1 conspiracy count, the Eleventh Circuit never mentioned Aquatherm's failure to name co-conspirators as a basis for the dismissal. *The Eleventh Circuit affirmed dismissal of the Section 1 conspiracy* to restrain trade *because the complaint failed to state an antitrust injury*. Pet. App. 7-8. Aquatherm argues that it did allege antitrust injury. Pet. 17, n.6. But the complaint alleges only that deceptive advertising injured solar

pool heater sellers and Aquatherm.[4] Again, Aquatherm misses the point. *Injury must be to competition in a market.* "The antitrust laws . . . were enacted for 'the protection of competition not competitors.' " *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., et al.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Injury to Aquatherm alone is not enough, nor is injury to solar pool heaters enough. Nowhere in its complaint or even in these last-ditch efforts to salvage some kind of theory of its case has Aquatherm ever suggested that solar pool heater sellers are the relevant market.

4. As Petitioner notes, the Eleventh Circuit was silent on whether "false advertising can be the basis for antitrust liability." Pet. 16. The court of appeals did not have to reach the issue. Even assuming that deceptive advertising can be a basis for antitrust liability, and taking Petitioner's complaint allegation that FPL's advertising was deceptive as true for purposes of the Motion to Dismiss, Petitioner failed to state a claim.

CONCLUSION

This case has been in and out of state and federal court with a good number of complaints and amended complaints and has gone up and down and back up the appeals process. And, after all that, Aquatherm is still unable to state a viable claim. Both the Eleventh Circuit and the district court held that Aquatherm could prove no set of facts in support of its claims which would entitle it to relief under federal antitrust laws. Aquatherm's Petition is based almost entirely on dicta from a footnote in the Eleventh Circuit's opinion that, even if it was the holding of the case, would create no clear conflict between federal courts. Further, no other arguments made in the Petition present any conflicts between federal courts or any other basis for granting the Petition. Accordingly, FPL respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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